Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Sidley Austin LLP states that it is a partnership owned and operated by individual partners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sidley Austin LLP ("Sidley") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 437 F.3d 695 (7th Cir. 2006) (Pet. App. 1a-3a). The opinion of the United States District Court for the Northern District of Illinois is reported at 406 F. Supp. 2d 991 (N.D. Ill. 2005) (Pet. App. 4a-15a).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2006. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Age Discrimination in Employment Act ("ADEA") are reproduced in the appendix to this petition at 16a-20a.

STATEMENT OF THE CASE

This case presents the issue of whether the conduct of individuals can affect the ability of the Equal Employment Opportunity Commission ("EEOC") to obtain relief on their behalf under the federal antidiscrimination laws.

In the decision below, the court of appeals held, based on its reading of this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), that the EEOC's ability to recover on behalf of individuals was "not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. As a result, the Seventh Circuit concluded that the EEOC could seek individual relief on behalf of a group of at least 32 lawyers who chose never to file charges with the EEOC—and thus who could not seek individual relief on their own behalf—because the court of appeals believed that the "doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

The court of appeals noted that its ruling was in accord with *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 42 (2005). Pet. App. 3a. There, the Eleventh Circuit held that the EEOC's "enforcement role is incompatible with a finding that its authority to bring an enforcement action is barred by a judgment in a private suit." *Pemco Aeroplex*, 383 F.3d at

1292. In doing so, the Eleventh Circuit concluded that "precedent . . . weighs heavily against finding privity between the EEOC and the private plaintiffs." *Id.* at 1294.

In stark contrast, other courts of appeals have held that the conduct of individuals can and should limit the relief sought by the EEOC because "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that places it in privity with those individuals." *Vines* v. *University of La.*, 398 F.3d 700, 707 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006). Indeed, in *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) (Alito, J.), the Third Circuit rejected the EEOC's argument that it was "not in privity with the individuals on whose behalf it maintains ADEA actions," *id.* at 496, and held that individuals who had litigated their "claims under the ADEA are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims," *id.* at 496-97; see also *EEOC* v. *W.H. Braum, Inc.*, 347 F.3d 1192, 1201-02 (10th Cir. 2003) (explaining in a case under the Americans with Disabilities Act ("ADA") that "employee's conduct 'may have the effect of limiting the relief that the EEOC may obtain in Court'"); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that EEOC in Title VII suit not permitted to seek back pay on behalf of individual "who has freely contracted away her right to back pay").

This conflict among the courts of appeals should be resolved by this Court. The extent to which an individual's litigation choices may limit the EEOC's ability to seek individual relief on his or her behalf is an important and recurring issue of federal law. Review and resolution of this conflict is particularly warranted because the EEOC is responsible for enforcing not just the ADEA, but other statutes including the Americans with Disabilities Act, Title VII of the Civil Rights Act and the Equal Pay Act. Thus, whether an individual's conduct can preclude the EEOC from

seeking individual relief is a significant and recurring issue under those statutes.

Contrary to the decision below, that issue was not resolved in *Waffle House*. Indeed, this Court expressly limited its ruling to the question "whether the fact that [the employee] has signed a mandatory arbitration agreement limits the remedies available to the EEOC." 534 U.S. at 297. In doing so, the Court reaffirmed that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in Court," *id.* at 296, and left "open" issues such as "whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek," *id.* at 297. In fact, the *Waffle House* Court took pains to reaffirm the continuing validity of cases such as *United States Steel Corp.* and *Goodyear Aerospace*, where the courts of appeals had held that the conduct of individuals limited the relief that could be sought by the EEOC on their behalf. *Id.* at 296-97.

In this case, the Seventh Circuit misread the decision in *Waffle House* by concluding that this Court held that the EEOC's right to seek recovery on behalf of an individual is in *all* circumstances "not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. That pivotal ruling poses the next logical question after *Waffle House*: When, if ever, can the EEOC obtain individual relief that would be barred if sought by the individual. That issue clearly warrants this Court's review.

A. Statutory Background.

Under the Age Discrimination in Employment Act ("ADEA"), an aggrieved individual may bring an action seeking legal or equitable relief based upon an alleged violation of the ADEA. 29 U.S.C. § 626(c)(1). The ADEA expressly recognizes that an employee unilaterally may knowingly and voluntarily waive his rights under the ADEA without EEOC approval. See *id.* § 626(f). The ADEA also

provides that "[n]o civil action may be commenced by an individual" unless that individual first has filed with the EEOC "a charge alleging unlawful discrimination" within 180 or 300 days "after the alleged unlawful practice occurred." *Id.* § 626(d).[1] By its terms, the ADEA thus prevents an individual from filing suit to recover individual relief if there has been no timely charge. *Id.*

The EEOC's regulations state that a "charge" "shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. §1626.6; *id.* § 1626.8(b) ("charge is sufficient" if it "conforms to the requirements of § 1626.6"). A charge "may be submitted in person, by telephone, or by mail to any office of the Commission or to any designated representative of the Commission." *Id.* § 1626.5. As the EEOC acknowledges, "[a]ll laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court." EEOC, *Filing a Charge of Employment Discrimination*, *at* http://www.eeoc.gov/charge/overview_charge_filing.html (modified Aug. 13, 2003).

The EEOC also has authority to bring suit under the ADEA. If the EEOC sues to enforce an individual's rights, then the employee's ability "to bring such action shall terminate." *Id.* § 626(c)(1). Through this statutory scheme, "Congress intended for the EEOC to serve as an individual's representative when it seeks to enforce that individual's rights." *United States Steel Corp.*, 921 F.2d at 495. In all suits under the ADEA, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to

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[1] Whether the charge must be filed within 180 or 300 days turns on whether state law also provides a remedy for discrimination based upon age. 29 U.S.C. § 626(d)(2); *id.* § 633(b). In this case, to be timely, charges by the 32 individuals would have to have been filed within 300 days after the fall of 1999.

effectuate the purposes of" the ADEA. See 29 U.S.C. § 626(b).

Moreover, this Court and others long ago recognized that the conduct of individuals can affect the relief that is appropriate for the EEOC to seek on their behalf. For example, in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 223-24 (1982), this Court held that an individual's failure to mitigate damages precludes full recovery of back pay. Similarly, in *United States Steel Corp.*, 921 F.2d at 496, the Third Circuit held that res judicata precludes the EEOC from obtaining individual relief in an ADEA suit after individuals have litigated the same claim in a private suit. And, in *Goodyear Aerospace Corp.*, 813 F.2d at 1542-43, the Ninth Circuit held that an employee's settlement with his employer rendered "moot" the EEOC's Title VII claim for back pay on behalf of the employee because "any recovery of back pay by the EEOC would go directly to [the employee] who has freely contracted away her right to back pay."

Finally, courts of appeals had divided over the extent that these principles should be extended to bar the EEOC from filing suit on an individual's behalf in federal court where that individual had signed an agreement to arbitrate. Compare, *e.g.*, *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that private agreement to arbitrate foreclosed EEOC suit seeking recovery on behalf of individual who had signed arbitration agreement), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that private agreement to arbitrate did not limit EEOC's authority to seek relief on individual's behalf).

B. *EEOC* v. *Waffle House.*

In *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), this Court granted certiorari to resolve the conflict among the courts of appeals on the narrow issue of whether the EEOC can obtain individual relief in federal court on behalf of an employee who had signed a mandatory arbitration agreement.

In that case, Eric Baker, an employee of Waffle House, signed an arbitration agreement that obligated him to resolve disputes relating to his employment by binding arbitration. *Id.* at 282. After he was discharged, Baker "file[d] a timely charge of discrimination with the EEOC alleging that his discharge violated the [Americans with Disabilities Act]." *Id.* at 283. The EEOC subsequently filed suit against Waffle House, seeking both injunctive relief and individual relief on Baker's behalf. *Id.* at 283-84. This Court explained that the "only issue before [it was] whether the fact that Baker ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." *Id.* at 297.

This Court held that the arbitration agreement did not limit the EEOC's ability to obtain individual relief on his behalf, explaining that the Federal Arbitration Act "does not purport to place any restriction on a nonparty's [EEOC's] choice of a judicial forum." *Id.* at 289. The Court did not seek to discard lower court precedent establishing that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296. To the contrary, the Court devoted Part V of its opinion to confirm its approval of decisions holding, for example, that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action." *Id.* at 297 (citing, with approval, *United States Steel Corp.*, 921 F.2d at 495 and *Goodyear Aerospace*, 813 F.2d at 1542). The Court recognized that in "several situations," the "EEOC does not stand in the employee's shoes," but it did not question that "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims." *Id.* at 297-98.

C. The EEOC's Proceedings and District Court's Decision.

In the fall of 1999, Sidley & Austin ("Sidley") decided, for performance reasons, to change the status of 32 equity partners in its law partnership. Under the ADEA, these individuals could not bring a lawsuit against Sidley unless

they first had filed a charge with the EEOC within 300 days of the challenged action. See 29 U.S.C. § 626(d)(2). Now, more than six years later, none of the 32 individuals has ever filed a charge with the EEOC alleging age discrimination or any other form of discrimination. What is at issue here is whether the EEOC may obtain individual damages on behalf of a group of individuals who chose not to seek that relief for themselves.[2]

In July 2000, the EEOC's District Director by letter notified Sidley that the EEOC was "investigating" Sidley "to determine its compliance status with the ADEA." Letter from John P. Rowe to Sidley & Austin at 1 (July 5, 2000) (Ex. A to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). In that letter, the EEOC included 29 requests for information. Sidley provided information informally but maintained that, as a bona fide partnership, the issue of "coverage"—whether the 32 partners were "employees" covered by the ADEA—should be decided before Sidley was required to turn over information on other topics. The EEOC disagreed, issued a subpoena and sought to enforce the subpoena in federal district court. See *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002).[3]

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[2] Sidley also has defended against the EEOC's lawsuit because it has not engaged in any discrimination outlawed by the ADEA and because the 32 equity partners were not "employees," and thus were not covered by the ADEA.

[3] In that decision, the court of appeals ruled that "the district court was premature to order the subpoena complied with in its entirety" because "[w]ithout having proposed a standard or criterion to guide the determination, the Commission has not earned the right to force the law firm . . . to go on and produce the voluminous and sensitive documentation sought relating to the question whether, if these 32 partners were employees, they were demoted on account of their age." 315 F.3d at 707; *id.* at 711 (Easterbrook, J., concurring in part and in judgment) (stating that, "under the prevailing law of agency," "it is very likely that the 32 lawyers Sidley demoted would be classified as partners rather than employees").

During the proceedings about the enforcement of the EEOC's subpoena, Sidley asked the EEOC whether anyone had filed a "Charge of Discrimination" within the meaning of the ADEA. See Letter from Paul Grossman to Deborah L. Hamilton at 1-2 (Dec. 20, 2001) (Ex. B to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). On December 27, 2001, more than two years after the decision affecting the 32 partners, the EEOC confirmed that "[n]o partner or former partner of Sidley & Austin has yet filed a charge of discrimination." See Letter from Deborah L. Hamilton to Paul Grossman at 1 (Dec. 27, 2001) (Pet. App. 27a) (Ex. C to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). Accordingly, there is no dispute that, under the ADEA, none of the 32 individuals can file suit to obtain relief under the ADEA. See 29 U.S.C. § 626(d) (requiring individual to file timely "charge" before the individual may bring a lawsuit).

On July 15, 2004, the EEOC's Chicago office issued a "determination letter" stating its view that there was reasonable cause to believe that Sidley had violated the ADEA. After efforts at settlement failed, the EEOC filed a complaint on January 2, 2005 in the United States District Court for the Northern District of Illinois alleging that Sidley had violated the ADEA. The Complaint is not limited to the events that arose in late 1999. Instead, according to the EEOC, "since at least 1978," Sidley has discriminated against an unspecified group of partners on account of their age. Complaint ("Compl.") ¶ 6(A) (Pet. App. 23a). The EEOC's Complaint seeks to enjoin Sidley "from engaging in any employment practice which discriminates on the basis of age against individuals 40 years of age and older." *Id.* ¶ A (Pet. App. 23a).

As relevant here, Sidley does not contend that the failure of the 32 individuals to file charges under the ADEA prevents the EEOC from seeking injunctive relief. What is at issue here is the individual relief sought by the EEOC. In its

Complaint, the EEOC seeks a judgment requiring Sidley "to make whole all individuals adversely affected by the unlawful practices described above, by providing . . . reinstatement and complete restoration of a class of employees over the age of 40 to the status of 'partner' which they, respectively, occupied previously, or in the alternative front pay, as well as, back pay, prejudgment interest, the value of lost benefits and liquidated damages." *Id.* ¶ C (Pet. App. 24a).

Soon after the EEOC filed its Complaint, in an effort to reduce and simplify the issues to be litigated, Sidley and the EEOC agreed that the parties would benefit from an early decision on the following question of law that fundamentally affects the scope and nature of this case: Whether the EEOC may recover individual-specific relief where, as here, no individual filed a timely charge of discrimination. Under then-existing Seventh Circuit precedent, the failure of the 32 individuals to file charges with the EEOC constituted a complete bar to the EEOC's recovery of individual relief on their behalf. See *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607, 619-20 (7th Cir. 2001); see also *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993).

In *North Gibson*, the Seventh Circuit relied upon the Third Circuit's decision in *United States Steel Corp.* to hold that the EEOC cannot seek damages on behalf of individuals who have failed to file timely charges of discrimination with the EEOC. 266 F.3d at 614-15. In *United States Steel Corp.*, the Third Circuit had held that the EEOC could not recover individual relief on behalf of individuals who had already litigated their claims on their own behalf. 921 F.2d at 496-97. The *North Gibson* Court reasoned that if any of the individuals who had failed to file timely charges had initiated a lawsuit, it necessarily would have been dismissed "for a failure to comply with the statutory filing requirement." 266 F.3d at 616. Then, following the principles set forth in *United States Steel Corp.*, the prohibition "on the EEOC's

subsequent relitigation of the same claims would apply squarely." *Id.* at 617.

The EEOC opposed Sidley's motion, arguing that *Waffle House* had overruled *North Gibson*. The district court recognized that if *North Gibson* were still good law then the EEOC's request for individual relief would have been barred because there was no dispute that the 32 individuals had failed to file a charge. See Pet. App. 6a ("If there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred."). The district court nonetheless denied partial summary judgment because it concluded that this Court's decision in *Waffle House* had overruled *North Gibson*. *Id.* at 9a. Recognizing that, "[i]n the end, Sidley may be right about the survival of *North Gibson*," *id.* at 13a, the district court certified the legal issue presented here for immediate interlocutory review, *id.* at 15a.

D. The Decision Below.

The Seventh Circuit accepted Sidley's application for interlocutory review, but (without separate briefing and argument) affirmed the district court's decision denying summary judgment. The court of appeals agreed that its prior decision in *North Gibson* barred the EEOC from obtaining "monetary relief on behalf of individuals" who had "failed to file timely administrative charges under the ADEA." Pet. App. 1a-2a. The court of appeals held, however, that *North Gibson* was "no longer good law" because it had been "scuttled by the Supreme Court in *EEOC* v. *Waffle House*." *Id.* at 2a. The Seventh Circuit observed that *Waffle House* held that the EEOC's claim for monetary relief under the ADA "was not barred by the fact that the victim had agreed to arbitrate any disputes arising out of his employment." *Id.*

The court of appeals ruled that *Waffle House* also held that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it seeks to make them

whole." Pet. App. 2a. Thus, the court below concluded that the EEOC was "not bound by the failure of the Sidley ex-partners to exhaust their remedies." *Id.* Although the court of appeals acknowledged that *Waffle House* reaffirmed that the conduct of an employee "'may have the effect of limiting the relief that the EEOC may obtain in court,'" *id.*, it ruled that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to resolve a conflict among the circuits over whether an individual's conduct can bar the EEOC from seeking individual relief under the ADEA and other antidiscrimination laws where such conduct would bar the individual from obtaining such relief.

First, review by this Court is appropriate because the decision below implicates a well-developed split among the circuits on this issue. See Sup. Ct. R. 10(a). The Fifth Circuit, as well as the Third, Ninth and Sixth Circuits, have held that conduct by an individual can and does limit the relief sought by the EEOC on that individual's behalf. Likewise, the Tenth Circuit has recognized that same rule in dicta. In contrast, the Seventh Circuit (in the decision below) and the Eleventh Circuit have rejected the conclusion that the EEOC is in "privity" with the individuals on whose behalf it seeks relief, and therefore have held that the recovery that the EEOC seeks is entirely independent of the legal rights of these individuals.

Second, this conflict concerns an important and recurring issue of federal law that has not been, but should be, decided by this Court. See Sup. Ct. R. 10(c). This Court did not purport to resolve that question when it decided *Waffle House*. 534 U.S. at 297 ("no question concerning the validity of his claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum

is presented by this record"). To the contrary, the Court went out of its way to reaffirm the continuing validity of cases holding that the conduct of individuals, in fact, does limit the relief obtained by the EEOC. *Id.* at 296-98.

Finally, the decision below is wrong because it cannot be reconciled with the ADEA or with the *Waffle House* decision upon which it purports to rely. See Sup. Ct. R. 10(a). Contrary to the decision below, *Waffle House* did not hold or suggest that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. To be sure, this Court identified "several situations in which the EEOC does not stand in the employee's shoes," 534 U.S. at 297, but it squarely confirmed that the conduct of private individuals "may have the effect of limiting the relief that the EEOC may obtain in court," *id.* at 296.

I. THE DECISION BELOW IMPLICATES A WELL-ESTABLISHED CONFLICT AMONG THE FEDERAL COURTS OF APPEALS.

A. There Is A Well-Established Conflict On The Issue Whether An Individual's Conduct Can Affect the EEOC's Ability To Obtain Monetary Relief For That Individual.

1. In *Vines* v. *University of Louisiana*, 398 F.3d 700 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006), the Fifth Circuit reviewed a district court decision holding that plaintiffs Vines and McGraw "were not bound by a federal court decision because they were not a party in that suit nor was there privity between the EEOC and the individual plaintiffs." *Id.* at 706. The district court ruled that the plaintiffs were not in privity with the EEOC because the action filed by the EEOC "was not prosecuted solely for the individual benefits of Vines and McGraw, but rather for the general public interest." *Id.*

On appeal, the Fifth Circuit reversed. It held that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that place[] it in privity with those individuals." *Id.* at 707. As such, the Fifth Circuit concluded that the EEOC is "in privity with individuals for whom it seeks relief such that a lawsuit litigated by either the EEOC or the individual bars subsequent relitigation of the same claims or issues." *Id.* at 708; *id.* at 709 (explaining this doctrine "applies equally regardless of the order of litigation").[4] Applying these principles, the *Vines* court ruled that the plaintiffs could not proceed with their age discrimination claims because their allegations were the same as those litigated previously by the EEOC. *Id.* at 710, 712. In doing so, the Fifth Circuit acknowledged this Court's decision in *Waffle House*, and concluded that it did not alter the law that "the ADEA gives the EEOC representative responsibilities when it seeks private benefits for an individual." *Id.* at 708 (internal quotation marks omitted).

The Fifth Circuit did not break new ground, but instead relied heavily on *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990). There, the Third Circuit, through then-Judge Alito, addressed whether "res judicata precludes an individual who has unsuccessfully sued an employer for age discrimination from obtaining individual relief in a later suit that is brought by the [EEOC] and that asserts the same claim." *Id.* at 490. Based upon an analysis of the statutory scheme, the Third Circuit ruled that the ADEA gives the "EEOC representative responsibilities when it seeks private benefits for an individual and that the doctrine of representative claim preclusion must therefore be applied." *Id.* at 495 ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable"). As

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[4] In *EEOC* v. *Cosmair, Inc.*, the Fifth Circuit similarly explained that, under the ADEA, "an employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf." 821 F.2d 1085, 1091 (5th Cir. 1987).

relevant here, the court of appeals considered and rejected the EEOC's argument that it was not "in privity with the individuals on whose behalf it maintains ADEA actions because Congress intended the Commission to protect 'a broader independent public interest different from that of an individual grievant.'" *Id.* at 496. Instead, the Third Circuit held that the individuals were "precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 496-97.

In doing so, the Third Circuit acknowledged that the EEOC "has the responsibility to protect a vital public interest that transcends the interests of any or all aggrieved individuals," but that these "responsibilities *include* the representation of grievants when it seeks individual relief on their behalf." *Id.* at 496. And, when the EEOC "seeks individualized benefits under the ADEA for particular grievants, . . . the Commission functions to that extent as their representative." *Id.*

Consistent with these decisions, the Tenth Circuit too has acknowledged, in a case arising out of the ADA, that an individual's conduct may have the effect of precluding the EEOC from pursuing individual-specific relief. *W.H. Braum, Inc.*, 347 F.3d at 1201. In *W.H. Braum*, the court of appeals recognized that "[a]n aggrieved employee's conduct 'may have the effect of limiting the relief that the EEOC may obtain in court.'" *Id.* (quoting *Waffle House*, 534 U.S. at 296). Ultimately, the Tenth Circuit ruled that res judicata did not apply under the facts of that case. It did so not because the EEOC and plaintiff were not in privity, but because the defendant had "failed to show any conduct" on the part of the plaintiff that "in any way limits the relief the EEOC may seek." *Id.* at 1201-02 ("because there is no basis for time-barring Ms. Willis, there is no basis for arguing the EEOC is derivatively time-barred").

Similarly, in *EEOC* v. *Goodyear Aerospace Corp.*, the Ninth Circuit held that an employee's settlement with his employer precluded the EEOC from seeking back pay on the

employee's behalf. 813 F.2d at 1542-43. The Ninth Circuit acknowledged the EEOC's argument that a "back pay award advances the public interest in deterring the employer from illegal discrimination," but the court ruled that "the public interest in a back pay award is minimal" because "any recovery of back pay by the EEOC would go directly to [the employee] who has freely contracted away her right to back pay." *Id.* at 1543. Accordingly, the Ninth Circuit concluded that the EEOC's "claim for back pay on [the employee's] behalf is moot." *Id.*

Finally, in *EEOC* v. *McLean Trucking Co.*, the Sixth Circuit held that the conduct of an individual could limit the ability of the EEOC to recover on his behalf. 525 F.2d 1007, 1011 (6th Cir. 1975). There, the court of appeals considered whether an individual's "compromise settlement" of his earlier private action barred the EEOC from "recover[ing] any 'private benefit', such as back pay," on his behalf. *Id.* at 1011. The court of appeals held that the individual could not recover "additional benefits" relating to his individual circumstances because he "[was] bound by the settlement which he made and which was approved by the court." *Id.* at 1010.

2. In stark contrast, in the decision below, the court of appeals held that the failure of the 32 individuals to file timely charges with the EEOC did not preclude the EEOC from seeking individual relief on their behalf. Pet. App. 2a-3a. The court of appeals acknowledged that this conclusion was contrary to its prior ruling in *EEOC* v. *North Gibson School Corp.*, 266 F.3d 607 (7th Cir. 2001), but the court below concluded that *North Gibson* was "no longer good law," because it "was scuttled by the Supreme Court in [*Waffle House*]." Pet. App. 2a. The court of appeals read *Waffle House* to say that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole" and therefore the EEOC "is not bound by the failure of the Sidley ex-partners to exhaust

their remedies." *Id.* Indeed, the court of appeals concluded that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

Further, the court of appeals recognized and cited with approval a decision from another circuit court in a "related context[]." Pet App. 3a (citing *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004)). In *Pemco Aeroplex*, the Eleventh Circuit addressed the question whether an adverse judgment in an earlier suit brought by private individuals would bar the EEOC from bringing a later suit on the same grounds. 383 F.3d at 1285. In that case, the EEOC sought both injunctive relief as well as "monetary compensation" for each of the defendants' covered employees. *Id.* at 1283.

In deciding whether the lawsuit could proceed, the Eleventh Circuit explained that "before the doctrines of either res judicata or collateral estoppel may be asserted against a party, it must be established that the party in the second action was either a party in the previous action or a *privy* of the party in that action." *Id.* at 1285 (explaining that collateral estoppel requires a showing that the parties are "in privity") (emphasis added). After reviewing the relevant case law, the court of appeals held that the EEOC was not bound by the prior private lawsuit because "the district court clearly erred in finding privity between the EEOC and the [private] plaintiffs." *Id.* at 1294.

In sum, there is a well-developed conflict among the courts of appeals on the issue of whether conduct by an individual can bar the EEOC from seeking recovery on their behalf.[5]

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[5] District courts post-*Waffle House* likewise reflect the conflict among the courts of appeals. *Compare Mohammed* v. *May Dep't Stores, Co.*, 273 F. Supp. 2d 531, 537 (D. Del. 2003) (finding that the EEOC and plaintiff "were in privity and that Defendant has satisfied its burden of establishing the three elements of claim preclusion"), *and EEOC* v. *TIC-The Indus.*

B. This Case Directly Implicates The Circuit Conflict.

As discussed above, the conflict among the courts of appeals turns on the question of whether the EEOC and the private individuals upon whose behalf it seeks relief are in "privity" such that the conduct of one can serve to limit the relief sought by the other. If the Seventh Circuit applied the standards set forth in decisions by the Fifth, Third, Tenth, Ninth, and Sixth Circuits, then it would not have reached the outcome that it did in this case. As a result, this case presents an ideal vehicle to resolve that circuit conflict.

In the decision below, the court of appeals recognized that its holding depended on the conclusion that *Waffle House* changed preexisting law in that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. Indeed, the court of appeals acknowledged that it previously had reached the opposite result on the "identical question" in the *North Gibson* case before this Court decided *Waffle House*. *Id.* at 2a.[6]

In *North Gibson*, the Seventh Circuit held that the EEOC could not seek damages under the ADEA on behalf of seven individuals who had failed to file timely charges of discrimination with the EEOC. 266 F.3d at 616-17. There, the EEOC sought to recover both individual and injunctive relief for five individuals who had never filed any charge with the EEOC and for two others whose EEOC charges were

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Co., No. 01-1776, 2002 WL 31654977, at *3 (E.D. La. Nov. 21, 2002) ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable") (internal quotation marks omitted) (omission in original), *with Senich* v. *American-Republican, Inc.*, 215 F.R.D. 40, 46 (D. Conn. 2003) ("*Waffle House* can be read to end the limitation on the EEOC to seek victim-specific relief on behalf of employees who sign a waiver or release").

[6] The district court also agreed that, if *North Gibson* remained good law, then "the individual relief sought by the EEOC in this case would certainly be barred." Pet. App. 6a.

untimely. *Id.* at 614, 616. Relying on *United States Steel Corp.*, the Seventh Circuit concluded that the EEOC could seek injunctive relief, but could not obtain individual monetary relief for employees who had failed to file timely charges. 266 F.3d at 616. The court reasoned that, under the ADEA, "*the EEOC is in privity with the [individual employees], and it represents their interests in this claim for monetary relief.*" *Id.* (emphasis added). As a result, the *North Gibson* court explained that if any of the individuals had initiated a lawsuit, that lawsuit necessarily would have been dismissed because of their "failure to comply with the statutory filing requirement," *id.* at 616-17, and then the prohibition "on the EEOC's subsequent relitigation of the same claims would apply squarely," *id.* at 617.

Those are precisely the facts presented in this case. In the decision below, all that has changed since the Seventh Circuit's ruling in *North Gibson* is that court's subsequent conclusion that *North Gibson* was "scuttled" by this Court's decision in *Waffle House*. Pet. App. 2a. That is, the decision below turns on the court of appeals' conclusion that now, under *Waffle House*, "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

That holding cannot be reconciled with the decisions of other courts of appeals that have concluded that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that place[] it in privity with those individuals." *Vines*, 398 F.3d at 707; see also *United States Steel Corp.*, 921 F.2d at 496 (rejecting argument that EEOC "is not in privity with the individuals on whose behalf it maintains ADEA actions"); *W.H. Braum*, 347 F.3d at 1201 (noting that conduct of individual can, in appropriate circumstances, limit the relief sought by the EEOC).

Simply put, resolution of the conflict among the courts of appeals is outcome determinative because, if the Seventh Circuit had applied, for example, the standards set forth in the

Fifth Circuit's decision in *Vines* or the Third Circuit's decision in *United States Steel Corp.*, then the EEOC would not have been permitted to seek individual relief on behalf of the 32 individuals who the record reflects did not file timely charges (or any charges) with the EEOC.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

The conflict in this case over whether the conduct by individuals can limit the EEOC's ability to obtain relief on behalf of those individuals raises an important and recurring issue of federal law that has not been, but should be, resolved by this Court. Indeed, the proper scope of the EEOC's responsibility under the ADEA and other antidiscrimination laws is a threshold issue for the implementation of these important congressional enactments.

First, the importance and recurrence of issues surrounding the EEOC's authority and limitations on that authority are confirmed by this Court's repeated efforts to ensure uniformity in the law with regard to the effect of conduct by an affected individual on the EEOC's inability to litigate. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ruling that valid arbitration agreements "will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief"); *Ford Motor Co.*, 458 U.S. at 231-32 (ruling that employees who failed to mitigate their damages limited the EEOC's ability to obtain relief on their behalf); see also Robert Bass, Casenote, *Tort Law—Employment Law—Rights of the EEOC*—EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002), 33 Cumb. L. Rev. 727, 737 (2003) ("[T]he issue of EEOC rights has been heavily litigated since 1972.").

That conclusion is underscored by the scope of the EEOC's litigation and enforcement efforts. Over the last five years,

the EEOC has filed, on average, more than 400 lawsuits each year. See EEOC, *Litigation Statistics, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/litigation.html (modified on April 13, 2006). During that same five-year period, the EEOC states that it has recovered "monetary benefits" through litigation in excess of $500 million dollars. *Id.* Further, during that period, the EEOC has filed nearly 150 cases involving alleged violations of the ADEA. *Id.*

As substantial as these numbers are, they are dwarfed by the EEOC's pre-litigation enforcement efforts. In 2005, more than 75,000 charges were filed with the EEOC relating to the various statutes enforced by the EEOC. See EEOC, *Charge Statistics, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/charges.html (modified on Jan. 27, 2006).[7] In particular, 16,585 charges were filed pursuant to the ADEA, *id.*, and more than 14,000 age-discrimination charges were resolved separate and apart from the EEOC's litigation efforts. See EEOC, *Age Discrimination in Employment Act (ADEA) Charges, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/adea.html (modified on January 27, 2006).

Both the EEOC's litigation *and* enforcement activities would be affected by resolution of the question whether the conduct of individuals limits the EEOC's authority to seek and obtain relief on their behalf. Given the reach of the EEOC's enforcement and litigation authority, there can be no doubt that the issue of the scope of the EEOC's authority to obtain relief on behalf of individuals is an important and recurring issue that warrants this Court's review.

Second, this Court's decision in *Waffle House* did not purport to resolve the issue of whether an individual's conduct may limit the EEOC's ability to obtain compensatory

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[7] More than 35 percent of the charges filed with the EEOC in 2005 involved claims of race discrimination; more than 30 percent involved claims of sex discrimination; and a full 22 percent involved claims of age discrimination. EEOC, *Charge Statistics, FY 1992 through FY 2005*.

relief in federal court. To the contrary, this Court was careful to limit the scope of its holding to "whether the fact that [the employee] ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." 534 U.S. at 297. In limiting its holding, this Court recognized that an "[employee's] conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296. And, in doing so, this Court cited with approval the Third Circuit's decision in *United States Steel Corp.* for the principle that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 297.[8] The holding in *United States Steel Corp.*, in turn, is based upon that court's rejection of the argument that the EEOC "is not in privity with the individuals on whose behalf it maintains ADEA actions." 921 F.2d at 496.

Third, despite the express limits on the holding in *Waffle House*, 534 U.S. at 297, the EEOC has sought, successfully, to expand its enforcement authority to encompass claims for

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[8] *Compare* J.P. Julienne, Case Note, *Employment Law—Binding Arbitration Agreements and Federal Remedies—Equal Employment Opportunity Commission Has the Ability To Pursue Victim-Specific Relief In Discrimination Actions for Employees Bound By Arbitration Agreements*, 70 Tenn. L. Rev. 583, 602 (2003) (explaining that the *Waffle House* majority "narrowed its holding to the specific facts of the case in order to reconcile its seemingly contradictory support for court-imposed limitations on EEOC recovery as set forth in *Ford Motor Co.*, *Goodyear Aerospace Co.* and *United States Steel Corp.*"), *and Federal Arbitration Act*, 116 Harv. L. Rev. 382, 388 (2002) ("the Court's emphasis on the EEOC's exclusive control over discrimination charges is at odds with its discussion of the ways that employee conduct can affect the remedies the EEOC may seek, suggesting the potential for future decisions that may undermine the reasoning of this one"), *with* Jason A. McNiel, Note, *The Implications of* EEOC v. Waffle House: *Do Settlement and Waiver Agreements Affect the EEOC's Right To Seek and Obtain Victim-Specific Relief?*, 38 Ind. L. Rev. 761, 761 (2005) (concluding that *Waffle House* can be read to extend "to situations where an employee has previously settled or waived his or her claim").

individual relief on behalf of employees who "each had signed a valid waiver and release." *Senich* v. *American-Republican, Inc.*, 215 F.R.D. 40, 42 (D. Conn. 2003). Even though this Court in *Waffle House* recognized that an "employee's settlement 'render[s] her personal claims moot,'" 534 U.S. at 297 (internal citation omitted), the EEOC has argued successfully that *Waffle House* "'undermine[s] the reasoning' applied in the line of cases which have been interpreted to prohibit the EEOC from seeking victim-specific relief where an employee signs a waiver or release." *American-Republican*, 215 F.R.D. at 42, 46 (alteration in original). Such a position threatens to invalidate this Court's conclusion that disputes under the ADEA can be resolved "without any EEOC involvement." *Gilmer*, 500 U.S. at 28 ("nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes").

III. THE COURT OF APPEALS WAS WRONG IN CONCLUDING THAT *WAFFLE HOUSE* HELD THAT THE EEOC IS NOT IN "PRIVITY" WITH THOSE INDIVIDUALS FOR WHOM IT SEEKS RELIEF.

Certiorari also should be granted because the decision below was wrong in concluding that the "doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a.

First, this conclusion cannot be reconciled with the statutory structure of the ADEA. The right of any person to bring an action to enforce rights under the ADEA "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under [the ADEA]." 29 U.S.C. § 626(c). As the Third Circuit has explained, "Congress would not have crafted this enforcement scheme—on the one hand, creating an individual cause of action, and on the other, cutting off the individual's right to sue once the EEOC begins its action—unless Congress intended for the EEOC to serve as the

individual's representative when it seeks to enforce the individual's rights." *United States Steel Corp.*, 921 F.2d at 494-95; *accord Vines*, 398 F.3d at 707. Given this structure, "the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable." *United States Steel Corp.*, 921 F.2d at 495.[9] The decision below nowhere considers this statutory structure or the conflicting circuit cases that have examined this statutory scheme.

Second, the court below incorrectly concluded that *Waffle House* "scuttled" preexisting law and held that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. *Waffle House* says nothing of the kind. To the contrary, as noted above, this Court carefully limited its ruling to the issue before it. Specifically, because there was "no question concerning the validity of [the employee's] claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum," the "only issue before the Court [was] whether the fact that [the employee] ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." *Waffle House*, 534 U.S. at 297. In resolving that issue, this Court confirmed that "[i]t is true" that the conduct of an employee "may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296 (citing cases).

Although this Court recognized "several situations" in which "the EEOC does not stand in the employee's shoes," *id.* at 297, that is a far cry from the court of appeals' conclusion that the EEOC's ability to recover "is not derivative of the legal rights of individuals even when it is seeking to

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[9] *See also Vines*, 398 F.3d at 709 ("The doctrine of representative claim preclusion . . . applies equally regardless of the order of litigation."); *United States Steel Corp.*, 921 F.3d at 495 ("implicit" in "ADEA's enforcement scheme" is that "the doctrine of representative claim preclusion should apply symmetrically to those instances in which a private individual litigates first").

make them whole." Pet. App. 2a.[10] Indeed, if the Seventh Circuit were correct that the EEOC's rights do not depend on the "legal rights of individuals," then this Court was wrong when it concluded that the conduct of employees can "have the effect of limiting the relief that the EEOC may obtain in Court." 534 U.S. at 296.

Equally flawed is the court of appeals' conclusion that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. *Waffle House* made clear "that ordinary principles of res judicata . . . may apply to EEOC claims," 534 U.S. at 298, and cited with approval case law holding that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims," *id.* at 297.

Under settled law, collateral estoppel and res judicata can apply only if there has been a showing that the same party or its privy was involved in the prior case. See, *e.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 317 n.10 (1983) (noting "traditional principle that collateral estoppel may only be asserted by persons who were either a party or privy to the prior action"); see also 18A Wright, Miller & Cooper, *Federal Practice and Procedure* § 4448, at 326 (2d ed. 2002) (same). The court of appeals' ruling forecloses such a showing in every case because, in the Seventh Circuit, the EEOC "is not in privity

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[10] *See Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1103 & n.9 (9th Cir. 2006) (stating that, under *Waffle House*, EEOC "was not suing in a wholly derivative capacity"); *see also* Janelle M. Fleming, *An Employment Arbitration Agreement Does Not Bar the Equal Employment Opportunity Commission from Seeking Victim-Specific Relief in a Suit Alleging a Violation of Title I of the Americans with Disabilities Act:* Equal Employment Opportunity Commission v. Waffle House, Inc., 41 Duq. L. Rev. 225, 238 (2002) ("In analyzing the battle between the power of the EEOC and the policy goals of the FAA, the Supreme Court's decision in *Waffle House* appears to follow its former line of reasoning: EEOC claims will *at times* receive special consideration.") (emphasis added).

with the victims for whom it seeks relief." Pet. App. 3a. Thus, the court of appeals' suggestion that a party still may not "take two bites from the same apple" ignores that the decision below authorizes both the EEOC and a private individual to seek the same relief because the lack of privity between them means that, as a matter of law, they will never be taking bites from the "same apple." *Id.*

Finally, the Seventh Circuit's conclusion that the EEOC's rights to recover against a defendant do not depend on the "legal rights of individuals even when [the EEOC] is seeking to make them whole," Pet. App. 2a, runs contrary to Congress's judgment that the ADEA should "help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). If the legal rights of individual employees have no effect on the relief that the EEOC may seek, Pet. App. 2a-3a, then there will be limited incentives for employers voluntarily to resolve disputes with individuals under the ADEA. As such, the ruling below maximizes the incentives for expensive and duplicative litigation in federal court.

But, as this Court has explained, Congress in the ADEA expressed its preference for a "flexible approach to resolution of claims" whereby such "disputes can be settled, for example, without any EEOC involvement." *Gilmer*, 500 U.S. at 28, 29; 29 U.S.C. § 626(d) (requiring the EEOC to engage in "informal methods of conciliation, conference, and persuasion"). In sum, the court of appeals' ruling conflicts with both the structure of the ADEA and this Court's decision in *Waffle House* and thereby provides an additional reason for further review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-8002

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

SIDLEY AUSTIN LLP,
Defendant-Appellant.

Submitted Feb. 7, 2006
Decided Feb. 17, 2006

Before POSNER, EASTERBROOK, and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*.

In 1999, Sidley & Austin (as it then was) demoted 32 of its equity partners to "counsel" or "senior counsel." The EEOC began an investigation to determine whether the demotions might have violated the Age Discrimination in Employment Act. After we upheld the district court's rebuff of Sidley's effort to derail the investigation, *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir.2002), the Commission filed an ADEA suit against Sidley. Sidley asks us to entertain, as recommended by the district judge, an interlocutory appeal from the judge's denial of Sidley's motion for partial summary judgment. The appeal would require us to decide whether the judge was correct to rule that the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits. The ques-

tion satisfies the criteria in 28 U.S.C. § 1292(b) for an interlocutory appeal and since it has been fully briefed we can proceed to answer it.

The identical question received the opposite answer in *EEOC v. North Gibson School Corp.*, 266 F.3d 607 (7th Cir.2001), but that decision is no longer good law. It was scuttled by the Supreme Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), which held that the EEOC's claim for monetary relief for a victim of an alleged violation of the Americans with Disabilities Act was not barred by the fact that the victim had agreed to arbitrate any disputes arising out of his employment. The reason there was no bar was not that the arbitration clause was unenforceable but that the Commission was not bound by it because its enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole. Similarly, the Commission is not bound by the failure of the Sidley ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust.

Sidley seeks to distinguish *Waffle House* from the present case on the basis of the following sentence in the Court's opinion: "It is true, as respondent and its *amici* have argued, that Baker's conduct [Baker was the victim of the alleged violation of the ADA] may have the effect of limiting the relief that the EEOC may obtain in court." 534 U.S. at 296, 122 S.Ct. 754. But the remainder of the paragraph makes clear that the Court was talking about something quite different from a procedural forfeiture. "If, for example, [Baker] had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. As we have noted, it 'goes without saying that the courts can and should preclude double recovery by an individual.'" *Id.* at 296-97, 122 S.Ct. 754 (citations omitted). Similarly, had Baker sued and lost, the employer might have been able to interpose the judgment as a bar to the

EEOC's obtaining money for Baker, by virtue of the doctrine of collateral estoppel. *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir.1990). Even though (this is the doctrinal heart of *Waffle House*) the EEOC is not in privity with the victims for whom it seeks relief, it does not follow that they must be permitted to take two bites from the same apple.

For all we know, some of the ex-partners may have received settlements from Sidley and others may have failed to mitigate their damages. Suppose all have received settlements that have fully compensated them for the alleged violations of the age discrimination law. Then the EEOC could obtain no monetary relief on their behalf. But this was not the basis for Sidley's motion for partial summary judgment. The basis was a ground that *Waffle House* rejects, as we and other courts have already recognized in related contexts. *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir.2005); *EEOC v. Board of Regents*, 288 F.3d 296, 300 (7th Cir.2002); *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292-94 (11th Cir.2004), and cases cited there.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 05 C 0208

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD LLP.,
Defendant.

Dec. 20, 2005

MEMORANDUM OPINION AND ORDER

ZAGEL, *District Judge*.

In July 2000, the Equal Employment Opportunity Commission ("EEOC") opened a direct investigation into Defendant Sidley Austin Brown & Wood's ("Sidley") compliance with the Age Discrimination in Employment Act ("ADEA") in connection with a downgrading of 32 of its partners and a change in its mandatory retirement age. Specifically, Sidley told 32 partners that they had to either accept a downgrade in their status, from partner to counsel or senior counsel, or leave the firm. At the same time, Sidley lowered its mandatory retirement age from 65 to a sliding scale between 60-65.

The EEOC commenced its work after it was widely reported by the media in late 1999 that the status of Sidley's older partners had been changed to create more opportunities for younger lawyers at the firm, and after the EEOC received a confidential complaint from one of the affected partners.

On July 5, 2000, the EEOC notified Sidley of the investigation in a letter that included a designated charge number and was accompanied by a Request For Information. After receiving only partial responses from Sidley, the EEOC served it with a subpoena. This ultimately led to an enforcement action before Judge Lefkow and an appeal to the Seventh Circuit. After receiving documents provided in accordance with the courts' orders and after completion of its investigation, the EEOC issued a Letter of Determination finding reasonable cause to believe that Sidley had violated the ADEA by downgrading certain partners on account of their age and by maintaining a mandatory retirement age. On September 29, 2004, after conciliation discussions between the parties proved unsuccessful, the EEOC issued a Notice of Failure of Conciliation to Sidley, and filed this lawsuit on January 13, 2005, seeking monetary damages and injunctive relief.

Sidley is now seeking partial summary judgment on the EEOC's claims involving individual relief for the affected partners. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The question presented in Sidley's motion—whether the EEOC may pursue individual relief for persons who failed to file charges under the ADEA and are now barred from bringing their own individual suits—is a purely legal one, requiring that I determine whether *EEOC v. North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir.2001), was overruled by *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).

In *North Gibson*, the Seventh Circuit held that the EEOC could not recover individual relief under the ADEA if none of the alleged victims had filed a timely charge of discrimination. 266 F.3d at 619-20. In that case, five of the seven

claimants represented by the EEOC had not filed ADEA charges, and the remaining two had made untimely filings. The *North Gibson* decision was based on the premise that when the EEOC pursues an individual claim under the ADEA, it "steps into the shoes of the individual" and becomes that individual's representative. *Id.* at 615. This privity, as the courts have put it, is created by the ADEA's distinctive enforcement scheme, wherein the right of the individual to bring an ADEA action is terminated upon the commencement of such an action by the EEOC. *Id.* The Court of Appeals reasoned that, because the EEOC was acting in a representative capacity, it should not be able to seek monetary relief on behalf of an individual who had no right to relief, as there were no "shoes" into which the EEOC could step. *Id.* Since each of the seven suits would have been procedurally barred, the Court of Appeals held that the EEOC could not seek monetary relief on behalf of those individuals. *Id.* at 616. In its opinion, the Court of Appeals explicitly differentiated the EEOC's right to seek such individual relief from the EEOC's right to seek injunctive relief, stating that "[w]hen the EEOC sues on its own behalf to obtain an injunction that prohibits discrimination, it promotes the public interest because its 'interests are broader than those of the individuals injured by discrimination.'" *Id.* (quoting *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir.1993)).

If there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred. Here, the EEOC received a confidential request for an investigation but no ADEA charges. Since the time for such charges has long since expired, none of the 32 Sidley partners affected by the change in retirement policies would be entitled to seek relief from this or any other court, and I would be compelled to grant Sidley's motion.

A question about the validity of *North Gibson*, however, is raised by the Supreme Court's decision in *Waffle House*. In that case, the Supreme Court held that the EEOC could seek monetary relief for individuals whose claims were barred because each had signed a mandatory arbitration agreement with his or her employer. *Waffle House*, 534 U.S. at 295, 122 S.Ct. 754. The Court found that the Americans With Disabilities Act ("ADA") made "the EEOC the master of its own case" and "confer[red] on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291, 122 S.Ct. 754. The Court further found that "it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-92, 122 S.Ct. 754. The Court emphasized that the EEOC may seek "to vindicate a public interest . . . even when it pursues entirely victim-specific relief." *Id.* at 296, 122 S.Ct. 754. With this reasoning, the Court put an end to the distinction recognized in earlier cases, like *North Gibson*, between the EEOC's ability to seek individual monetary relief and its ability to seek injunctive relief. In this way, the Court makes it clear that the EEOC's right to bring suit seeking individual monetary relief goes beyond that of the individual and reaches the territory of public interest, thereby allowing the EEOC to seek relief for individuals, such as the affected Sidley partners in this case, who could not, for a variety of reasons, do so themselves.

Sidley, of course, argues that the *Waffle House* decision is applicable to only those cases in which the EEOC is seeking monetary relief on behalf of individuals who are subject to arbitration agreements.[1] This notion is dispelled by the

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[1] Sidley also contends that *Waffle House* does not apply to the ADEA because its enforcement scheme is distinct from that of the ADA. I find this reading of *Waffle House* to be particularly strained in light of the Seventh Circuit's decision in *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296 (7th Cir.2002). As discussed herein, in *BOR*, the Court of

Seventh Circuit's decision in *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296 (7th Cir.2002). In *BOR*, the Court of Appeals applied the reasoning developed in *Waffle House* to a case involving sovereign immunity—an area of law wholly unrelated to arbitration agreements. In determining that the EEOC had an independent right to sue the state of Wisconsin (and therefore the Board of Regents of the University of Wisconsin), the Court of Appeals relied heavily on the language from *Waffle House* stating that the EEOC was "the master of its own case" and could seek "to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 300, 122 S.Ct. 754 (quoting *Waffle House*, 534 U.S. at 296, 122 S.Ct. 754). The Court of Appeals found that this reasoning forestalled any argument that the EEOC was merely "standing in the shoes of the individuals" or was "acting in privity with them as their representative." *Id.* at 299-300, 122 S.Ct. 754.

Yet, Sidley urges me to base my opinion on exactly the same kind of privity logic that failed to persuade the courts in *Waffle House* and *BOR*. Sidley argues that I should deny the EEOC the right to seek individual monetary relief on behalf of the affected Sidley partners because the partners them-

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Appeals applied *Waffle House* to a case brought by the EEOC under the ADEA, clearly demonstrating that the rationale is applicable to ADEA cases. 288 F.3d at 300. The language in the *Waffle House* decision also indicates that it would be applicable to the ADEA. *Waffle House* discusses the province of the EEOC over discrimination cases during the first 180 days after a complaint is filed with the agency. The Court notes that during this 180-day period, the EEOC has full control of the complaint's litigation. *Waffle House*, 534 U.S. at 291, 122 S.Ct. 754. Within that period, an employee must obtain a right-to-sue letter before bringing a complaint in court and if, during that time, the EEOC decides to pursue its own suit, the individual has no independent cause of action. *Id.* This period creates an enforcement scheme much like that of the ADEA in which the EEOC's ADEA suit trumps any suit filed by an individual.

selves have no right to sue. I disagree. *Waffle House* makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right. I find it clear enough from the holdings in both *Waffle House* and *BOR* that the privity arguments seen in *North Gibson* are no longer applicable and that *Waffle House* does, in fact, overrule that decision.

In *BOR*, the Seventh Circuit did contemplate curtailing the EEOC's public interest based rights when there is another compelling, countervailing interest at issue. 288 F.3d at 300. As the Court notes, it would have to be more important than the right to arbitration or sovereign immunity. *Id.* Sidley contends that allowing the EEOC to seek monetary relief for individuals who are barred from doing so themselves, since they have failed to file charges within the statutorily allowed period, contravenes an employer's interest in a reasonably speedy resolution of discrimination claims, an interest which underlies all of our discrimination statutes. Sidley claims that allowing the EEOC to revive untimely claims obliterates the otherwise strictly enforced statutes of limitations associated with Title VII, ADA and ADEA cases. In the abstract, Sidley's argument does carry some weight, but in the context of this case it does not have much force. The EEOC began investigating Sidley's retirement practices approximately seven months after the changes to its policies, enacted in late 1999, were widely broadcast in the media and after receiving a confidential complaint. On July 5, 2000, the EEOC notified Sidley of the investigation with a letter that was accompanied by a document request. Over the next two years, the EEOC and Sidley battled over that document production. In July 2004, the EEOC completed its investigation and sent a Letter of Determination to Sidley stating that it had found reasonable cause to believe that Sidley's retirement policies violated the ADEA. After engaging in unsuccessful conciliation discussions, the EEOC filed this suit on January 13, 2005.

Throughout, these proceedings have been of great interest not only to Sidley, but also to most other large law firms across the country. It would be difficult for Sidley to argue that the EEOC's suit has come as a surprise, that the EEOC's claims concerning their new retirement policy are somehow stale, or that it had no reasonable opportunity for a speedy resolution of this matter. This is almost certainly why Sidley focuses on the possibility that the EEOC might bring their retirement policies dating back to 1978 into the suit. This argument, however, should really be directed toward determining the relevant class of individuals who may be properly represented by the EEOC in this suit. There may come a time when it is appropriate for me to set some temporal limits on the class of persons who may be represented in this case. But, that time is not now. The possibility that the individual claims of some partners affected by Sidley's longstanding retirement policies may be too remote for this case does not justify throwing out all the individual claims of partners affected by Sidley's newly implemented retirement plan. Accordingly, I find that concerns over bringing stale claims do not override the EEOC's right to advance the interests of the public by seeking individual relief for at least some individuals in this case.

Motion for Reconsideration and Certification for Interlocutory Review.

Sidley argues against my conclusion. It's two-part argument is worth consideration. The first reason Sidley gives for changing my decision is the rule that a District Court must follow the precedent of the Court of Appeals until the Court of Appeals specifically overrules that precedent. The Supreme Court has stated that all inferior courts must follow its clear precedent no matter how much its own later opinions have demolished the rationale for that precedent. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Doubts about

the reach of *Rodriguez* arose in the aftermath of the Supreme Court's evisceration of the sentencing guidelines in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *See, e.g., United States v. Booker*, 375 F.3d 508 (7th Cir.2004) (majority and dissenting opinions). The doubts have been wiped away by the Court's comments in *Eberhart v. United States*, ___ U.S. ___, 126 S.Ct. 403, 407, 163 L.Ed.2d 14, 21 (2005).

Sidley cites two Seventh Circuit opinions setting forth my obligation to "follow the decisions of [the Seventh Circuit] whether or not [I] agree." *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir.2004). *See also, Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir.1994) (must follow precedent not expressly overruled).

Donohoe is not the best case to illustrate this proposition, because it was deeply intertwined with the doctrine of law of that particular case and may have been concerned with the notion of a trial judge's ability to depart from an appellate opinion in the same case or, in military terms, to disobey the direct order of a superior. *Reiser* is a better case for Sidley but it does not carry the day. There, the District Judge had disregarded a Court of Appeals precedent construing state law for the reason that an Illinois Appellate Court had reached an opposite conclusion on the point. The Court of Appeals reasoning is instructive.

> A decision by a state's supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our

> precedent; assuredly they do not themselves liberate district judges from the force of our decisions.

Reiser, 380 F.3d at 1029.

A proper reading of this language means that the District Judge *is* free to disregard circuit precedent that is contrary to the rule pronounced by the court possessing final authority to decide that particular question of law. Here, the Supreme Court of the United States has final authority to decide this particular question of law. If its decision conflicts with the circuit precedent, I would be ignoring the dictates of the "hierarchical system" in which we operate. A district judge should not wait for a signal from the Court of Appeals before following the Supreme Court's rulings.

I do not think Sidley argues to the contrary. Its argument is that I am not free to disregard circuit precedent on the grounds that it has been *implicitly* overruled. I agree that ignoring circuit precedent because the rationale for that precedent has been eroded to its vanishing point is problematic. Rationales are not holdings and, even when the stated rationale has been shredded, it does not mean that the holding may not be justified by a different rationale.

It is, though, sometimes difficult to decide whether a Supreme Court decision is an implicit overruling. There are few who would urge that a legal rule can only be voided by expressly stating the rule, citing the prior cases and announcing they are overruled. In my view the question to ask is whether the *holding* (not the rationale) of the Supreme Court can be squared with the *holding* (not the rationale) of the Court of Appeals—whether any real distinction between the two holdings can be found without the intellectual contortions commonly (and perhaps unfairly) attributed to John Duns Scotus.

I adhere to my decision. It was the holding of the Supreme Court that caused me to find that *North Gibson* did not con-

trol this case. The Court held it was the EEOC's province to vindicate a public interest by pursuing monetary damages for an individual even when the individual could not or did not make the claim themselves (subject to limitations not yet relevant here). The claim that *Waffle House* applied only to the cases where individuals were bound by arbitration agreements seems to me to be the sort of "rationale" based argument disapproved in earlier cases. What might be left of the defendant's argument is disapproved by the holding in *Board of Regents*.

Sidley's last remaining argument is that *North Gibson* is still good law because in *Waffle House*, the Supreme Court specifically tells us that *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3rd Cir.1990), is still good law. When mentioning that decision, the Court stated that, "[i]t is true . . . that [the employee's] conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Waffle House*, 534 U.S. at 296, 122 S.Ct. 754. It then cited *U.S. Steel* as holding that, "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 297, 122 S.Ct. 754. In considering both the context and language of the Supreme Court in discussing *U.S. Steel*, I do not read it as precluding the EEOC from proceeding to litigate on the merits of whether an individual merits relief. The Court's actual concern and reason for citing *U.S. Steel* is most clearly expressed in the last words of the relevant paragraph. "As we have noted, it 'goes without saying that the courts can and should preclude double recovery by an individual.'" *Id.* (internal citations omitted). In the end, Sidley may be right about the survival of *North Gibson*, but the Supreme Court's treatment of *U.S. Steel* is not persuasive on that point. Double recovery is not at issue in this case.

The request to certify the question for interlocutory review is more difficult to answer, and not because there is little

chance I could be wrong. Another judge of this Court has already reached the contrary conclusion, which shows that the issue is fairly contestable. It is a question of controlling law.

The standard at issue is whether early appellate resolution will speed up the litigation. *See Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir.2000). Sidley argues that the discovery process in this case would be vastly simplified if it did not have to deal with questions of individual relief. While this might ordinarily be true, it is untrue here. The case before me presents fairly novel claims whose resolution might significantly affect the way professional firms using partnership forms conduct their internal affairs. In other words, this is an important question for a broad range of institutions beyond the one which is litigating here. The problems to be addressed are described in *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701-07 (7th Cir.2002).

The early judicial airing out of this issue generally, and in this case specifically, will require extensive discovery of how individuals were treated and why. Without a lot of detail, the merits of a broad legal theory rarely applied in this context will be difficult to discern. When the criteria for a decision are well established then less discovery will be required, or so I have noted in the cases before me.

The better argument for certification lies in the nature of the trial that would be conducted. If all that is at stake is injunctive relief, the volume of evidence that would need to be introduced would shrink. To show a pattern of age discrimination, the parties can rely on representative cases.[2] There will be no need to calculate the exact economic consequences for each individual. There will be fewer concerns

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[2] I do not mean to suggest that this is the complete universe of evidence that may be needed. I refer only to the quantity of evidence required as to the individuals whose treatment by defendant is at issue.

with preserving the anonymity of the individuals said to be damaged by defendant—an interest that both sides recognize as valid. In short, to establish whether Sidley is covered under the ADEA and whether it violated the law would take far less trial and trial preparation time. So, too, would the determination, if the EEOC makes its case, of what forward looking remedies ought to be imposed on defendant. Early resolution of the viability of *North Gibson* would, in my judgment, speed up the litigation. This is especially true here because the discovery can be ongoing while the interlocutory appeal is heard. There will, therefore, be nothing to delay preparation for trial. A ruling in defendant's favor would speed the litigation.[3]

I grant the motion for certification and direct defendant to prepare for review by Court and the EEOC a proposed order containing the question or questions to be certified.

Defendant's Motion for Summary Judgment is DENIED initially and on reconsideration. Defendant's Motion of Certification for Interlocutory Appeal is GRANTED.

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[3] Even if the defendant loses the appeal, a ruling might still slightly speed up the trial. It will spare the parties what I expect to be a long series of objections and arguments over the precise ambit of relevant evidence.

APPENDIX C

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discrim-

inatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed JAN 13, 2005]

Civil Action No. 05 C 0208

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD,
Defendant.

COMPLAINT
JURY DEMAND

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful employment practices on the basis of age and to provide appropriate relief to a class of attorney employees who were adversely affected by such practices. The Commission alleges that Defendant violated the ADEA by maintaining and implementing an age-based retirement policy and by downgrading or expelling a class of attorney employees age 40 years and older on account of their age in or about October 1999.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age

Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(b) (the "ADEA"), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 (the "FLSA"), as amended, 29 U.S.C. §§ 216(c) and 217.

PARTIES

2. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat. 2705.

3. At all relevant times, Defendant Sidley Austin Brown & Wood ("Defendant" or "Defendant Employer"), a Delaware limited liability partnership and its affiliates, which include an Illinois limited liability partnership, an English general partnership, and a New York general partnership, has been continuously doing business in the City of Chicago, State of Illinois, and has continuously had at least twenty (20) employees.

4. At all relevant times, Defendant has been an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§ 630(b), (g) and (h).

CONCILIATION

5. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices alleged below and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

STATEMENT OF CLAIMS

6. Defendant Employer has engaged in unlawful employment practices nationwide, in violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a):

(A) In maintaining and implementing, since at least 1978, an age-based retirement policy, Defendant Employer has discriminated against a class of attorney employees on account of their age in violation of the ADEA. The class of persons aggrieved includes Defendant Employer's attorney employees age 40 and older who were adversely affected by the retirement policy.

(B) Defendant Employer has discriminated against a class of attorney employees age 40 and older by downgrading or expelling them on account of their age in or about October 1999 in violation of the ADEA.

7. The effect of the practices complained of in paragraph 6 above has been to deprive a class of attorney employees age 40 and older of equal employment opportunities and otherwise adversely affect their status as employees, because of their age.

8. The unlawful employment practices complained of in paragraphs 6 and 7 above were and are willful within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals 40 years of age and older.

B. Order Defendant Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals 40 years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

C. Grant a judgment requiring Defendant Employer to make whole all individuals adversely affected by the unlawful practices described above, by providing the affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reinstatement and complete restoration of a class of employees over the age of 40 to the status of "partner" which they, respectively, occupied previously, or in the alternative front pay, as well as, back pay, prejudgement interest, the value of lost benefits and liquidated damages.

D. Grant such further relief as the Court deems necessary and proper in the public interest.

E. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by the Complaint.

Respectfully submitted,

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APPENDIX E

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Los Angeles, CA 90071

Re: Sidley Austin Investigation, No. 210-A03557

Dear Mr. Grossman,

This letter responds to your December 20, 2001 letter addressing the question whether a "Charge of Discrimination has been filed against Sidley."

As the EEOC's Memorandum in Support of Application for Order to Show Cause in Civ. No. 01C9635 explains, "Acting pursuant to its statutory authority, the Chicago District Office opened a *directed* investigation of Sidley's compliance with the Age Discrimination in Employment Act ('ADEA'), including but not limited to the 1999 partner demotions and reduction in the retirement age. See 29 C.F.R. 1626.4 (1991)." Memorandum at 4 (emphasis added). *See also* Declaration of Deputy District Director in Civ. No. 01C9635 at 2. ("Acting pursuant to its statutory mandate and

in accord with its regulations, the Chicago District Office opened a *directed* investigation into age discrimination at Sidley & Austin. See 29 C.F.R. 1626.4 (1991) (emphasis added)). No partner or former partner of Sidley & Austin has yet filed a charge of discrimination based on the 1999 partner demotions and changes in the retirement age, and nowhere in its pleadings in the subpoena enforcement action does the EEOC suggest that this has occurred.

From the beginning the EEOC has made clear that the EEOC's investigation of Sidley was proceeding pursuant to the EEOC's authority to conduct a directed investigation. The July 5, 2000 letter from the EEOC to Sidley & Austin opening the investigation indicates that the EEOC opened an "ADEA Directed Investigation" of Sidley & Austin, which was then assigned "EEOC Charge Number 210A03557." EEOC's references to the "Charge of Discrimination" cited in your December 20, 2000 letter thus refer to the charge number assigned to the directed investigation.

Because the EEOC pleadings to the Court in the current subpoena enforcement action and the EEOC's ongoing correspondence and communication with you make clear that EEOC is acting pursuant to its authority to conduct a directed investigation and not pursuant to any charge filed by any partner or former partner of Sidley & Austin, EEOC will file no clarifying document with the Court.

Sincerely,

/s/ Deborah L. Hamilton
DEBORAH L. HAMILTON
Trial Attorney

OPPOSITION BRIEF

(2)

Supreme Court, U.S.
FILED
JUL 21 2006
OFFICE OF THE CLERK

No. 05-1481

In the Supreme Court of the United States

SIDLEY AUSTIN LLP, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek relief under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, for individuals who have not filed timely administrative complaints and therefore would be barred from bringing their own individual suits.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 437 F.3d 695. The opinion of the district court (Pet. App. 4a-15a) is reported at 406 F. Supp. 2d 991.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2006. The petition for a writ of certiorari was filed on May 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, makes it unlawful,

subject to certain exceptions, for an employer to discriminate in employment because of an individual's age. 29 U.S.C. 623. The ADEA gives the Equal Employment Opportunity Commission (EEOC) authority to investigate possible violations of the Act that is commensurate with the authority that the Secretary of Labor has with respect to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(a) (The EEOC "shall have the power to make investigations * * * in accordance with the powers and procedures provided in sections 209 and 211 of this title [sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended].").

The ADEA also gives the EEOC the authority to seek relief that is commensurate with the authority that the FLSA gives to the Secretary of Labor. 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). In addition, the ADEA specifies that in an action brought by the EEOC to enforce the Act's prohibitions, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. 626(b).

The provision governing EEOC enforcement actions sets out only one requirement that the EEOC must satisfy before filing suit: "Before instituting any action under this section, the Equal Employment Opportunity

Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to initiate a civil action in any court of competent jurisdiction for legal or equitable relief. 29 U.S.C. 626(c). No such action may be commenced, however, "until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. 626(d). Furthermore, such a charge "shall be filed— (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred." 29 U.S.C. 626(d).

2. In the Fall of 1999, petitioner, a law firm, informed 32 partners that, in order to remain with the firm, they would have to accept a downgrade to "counsel" or "senior counsel." Pet. App. 4a. Simultaneously, petitioner changed its age-65 mandatory retirement policy to a policy under which partners were expected to retire some time between the ages of 60 and 65. *Ibid.* In late 1999, the media began reporting extensively on those events, characterizing them as an effort by petitioner to remove older partners in order to create more opportunities for younger lawyers at the firm. *Ibid.* During the same period, the EEOC received confidential information from one of the ex-partners who asked the EEOC to investigate petitioner's actions. *Ibid.*

In July 2000, the EEOC notified petitioner by letter that it was investigating the firm for possible violations of the ADEA. Pet. App. 9a. The letter specifically

stated that the EEOC was acting pursuant to its own independent authority to conduct a directed investigation, and not pursuant to any charges that had been filed by any partner or former partner at petitioner's firm. *Id.* at 26a-27a.

When petitioner declined the EEOC's request for certain documents, the EEOC issued a subpoena. Pet. App. 5a. Petitioner opposed the EEOC's effort to enforce the subpoena, arguing that none of its partners are covered employees within the meaning of the ADEA. The district court ordered the subpoena enforced, and the court of appeals affirmed to the extent that the documents sought information related to the coverage question. *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002).

3. After completing its investigation, the EEOC found reasonable cause to believe that petitioner had discriminated on the basis of age in violation of the ADEA. Pet. App. 5a. When efforts at conciliation failed, the EEOC filed suit in federal district court against petitioner, seeking both monetary damages and injunctive relief. *Ibid.*

In a motion for partial summary judgment, petitioner sought to preclude the EEOC from seeking victim-specific relief on the ground that none of the adversely affected partners had filed a timely charge. Pet. App. 5a. The district court denied petitioner's motion, holding that this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), "makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right." Pet. App. 9a.

Petitioner sought reconsideration or, in the alternative, certification of the issue to the court of appeals pursuant to 28 U.S.C. 1292(b). Pet. App. 10a. The EEOC opposed both requests. The district court denied reconsideration, but agreed to certify the issue to the court of appeals. *Id.* at 10a-15a.

4. The court of appeals agreed to decide the certified question and affirmed. Pet. App. 1a-4a. The court framed the question presented as whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." *Id.* at 1a.

The court of appeals noted that a prior Seventh Circuit decision had held that the EEOC could not obtain relief in such circumstances. Pet. App. 2a. The court held, however, that its prior precedent could not be squared with this Court's subsequent decision in *EEOC* v. *Waffle House*, 534 U.S. 279 (2002). Pet. App. 2a. The court explained that in *Waffle House*, the Court held that an individual's decision to arbitrate his claim does not preclude the EEOC from seeking monetary relief on his behalf because the EEOC's enforcement authority "is not derivative of the legal rights of individuals even when it is seeking to make them whole." *Ibid.* Applying that analysis, the court of appeals concluded that "the Commission is not bound by the failure of [petitioner's] ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust." *Ibid.*

The court of appeals also rejected petitioner's reliance on the statement in *Waffle House* that an individual's conduct "may have the effect of limiting the relief that the EEOC may obtain in court." Pet. App. 2a (quoting *Waffle House*, 534 U.S. at 296). The court explained

that this Court was not referring to a "procedural forfeiture," but to an individual's failure to mitigate and his acceptance of a settlement. *Ibid.* The court also stated that when an individual sues and loses, the employer might be able "to interpose the judgment as a bar to the EEOC's obtaining money for [that individual], by virtue of the doctrine of collateral estoppel." *Id.* at 2a-3a. Because petitioner sought summary judgment based entirely on a ground that was inconsistent with *Waffle House*, however, the court of appeals held that the EEOC was free to seek monetary relief for petitioner's ex-partners. *Id.* at 3a.

ARGUMENT

The court of appeals held, on interlocutory appeal, that the EEOC may seek victim-specific relief for individuals who did not file age discrimination charges with the EEOC. Pet. App. 2a. The interlocutory nature of the ruling provides a sufficient basis to deny review. In any event, the court of appeals' holding is supported by the plain language of the ADEA and this Court's decisions, and it does not conflict with the decision of any other court of appeals. For that reason as well, further review is not warranted.

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per

curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (Court generally should not review interlocutory order absent "extraordinary" circumstances); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some * * * unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

This case does not present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for immediate review by this Court. Discovery is proceeding in the district court, and resolution of the question presented by petitioner on the permissibility of make-whole relief will not affect the EEOC's ability to seek a determination of liability and appropriate injunctive relief. Should petitioner ultimately prevail on liability, the issue of the propriety of make-whole relief would become moot. Should the EEOC prevail on liability, petitioner will be able to raise any challenge to that determination in the court of appeals. And, if the court of appeals affirms, petitioner may then seek this Court's review on the propriety of make-whole relief, as well as on any other issue that petitioner chooses to raise at that time. See Pet. 8 n.2 (noting that petitioner has argued that its partners are not employees covered by the ADEA, and that the downgrading of 32 partners was performance-based). In those circumstances, there is no reason for the Court to deviate from its normal practice of denying review of interlocutory orders.

2. In any event, the court of appeals correctly held that an individual's failure to file a charge does not affect the EEOC's authority to seek relief for that individual, and that holding does not conflict with the decision of any other court of appeals. For that reason as well, review is not warranted.

a. Under the ADEA, the EEOC is explicitly empowered "to make investigations," whether or not it has received a charge of discrimination from an individual. 29 U.S.C. 626(a). As this Court has observed, "the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA 'from any source,' and it has independent authority to investigate age discrimination." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (citing 29 C.F.R. 1626.4, 1626.13); see 29 C.F.R. 1626.4 ("The Commission may, on its own initiative, conduct investigations of employers * * * pursuant to sections 6 and 7 of the Act."); 29 C.F.R. 1626.13 (Commission may continue investigation even after withdrawal of a charge "[b]ecause the Commission has independent investigative authority").

The ADEA also explicitly authorizes the EEOC to bring an action to recover monetary and injunctive relief for victims of discrimination. See 29 U.S.C 626(b) (incorporating 29 U.S.C. 216(b) and (c), 217), and separately providing that a court may award the EEOC victim-specific relief). The ADEA imposes only one precondition to an EEOC enforcement action—that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to file their own suit, but only if they first file an administrative charge within a specified number of days. 29 U.S.C. 626(d). By its terms, however, that administrative charge requirement affects only an individual's right to file his own ADEA action. It does not qualify the EEOC's separate authority to file its own suit and to seek relief for individual victims of discrimination. Thus, the text of the ADEA unambiguously gives the EEOC authority to seek relief for victims of discrimination regardless of whether those individuals have filed their own charges of discrimination.

That allocation of authority furthers the ADEA's purposes. Persons who are discrimination victims may be reluctant to file charges because of concerns about the consequences for their careers or for other legitimate reasons. In such situations, the Act allows the EEOC to determine whether it is in the public interest to seek relief for those persons.

b. This Court's decision in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), firmly supports the conclusion that the EEOC's authority to seek victim-specific relief is not dependent on an individual filing his own charge of discrimination. In that case, the Secretary of Labor sought minimum wages and overtime pay for workers who opposed application of the FLSA requirements to them. The Court upheld the Secretary's authority to seek such relief, explaining that "the purposes of the Act require that it be applied even to those who would decline its protections." *Id.* at 302. Because the ADEA incorporates the enforcement provision of the FLSA, 29 U.S.C. 626(b), that same principle governs the EEOC's authority to seek relief. And if the EEOC may seek relief for persons who ac-

tively oppose the EEOC's position, it may surely seek relief for persons who have simply chosen not to file charges.[1]

This Court's decision in *Waffle House* reinforces that conclusion. In that case, the Court held that the EEOC may seek victim-specific relief for individuals who have signed arbitration agreements. The Court explained that the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "clearly makes the EEOC the master of its own case," and "it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." 534 U.S. at 291-292. The Court added that even when the EEOC seeks entirely victim-specific relief, it "may be seeking to vindicate a public interest," *id.* at 296, and the EEOC's claim for that relief is therefore not "merely derivative." *Id.* at 297.

The situation here is analogous. The text of the ADEA unambiguously gives the EEOC authority to seek victim-specific relief regardless of whether an individual files a charge, and the EEOC's request for such relief is designed to vindicate the public interest. The court of appeals therefore correctly held that an individual's failure to file a charge does not preclude the EEOC's request for victim-specific relief.

c. Three other circuits, while not addressing the precise question presented here, have recognized that the failure of an individual to file a charge does not preclude the EEOC from filing suit. In *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1537 (1996), the Second Circuit held that "the EEOC may file suit where a charge was

[1] Should any discrimination victim refuse a monetary award, that money would be paid into the treasury. *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1208 n.16 (5th Cir. 1981).

not filed by the affected employee." In *EEOC* v. *American & Efird Mills, Inc.*, 964 F.2d 300, 303 (1992), the Fourth Circuit held that "[n]othing in the language of this title, or in the incorporated language of the other statutes, hinges EEOC authority on the filing of a valid employee charge." And in *EEOC* v. *Tire Kingdom, Inc.*, 80 F.3d 449, 451 (1996), the Eleventh Circuit held that "29 U.S.C. § 626(b) * * * grants the EEOC an independent right to bring suit to enforce the provisions of the ADEA, and that, "by its plain reading," the timely charge requirement, "does not apply to the EEOC." There is only one circuit decision that has ever applied the time limits for private individual actions to an EEOC action, and the court of appeals in this case overruled that decision. Pet. App. 2a (overruling *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)).

Petitioner contends (Pet. 13-15) that the decision below conflicts with the Fifth Circuit's decision in *Vines* v. *University of Louisiana*, 398 F.3d 700 (2005), cert. denied, 126 S. Ct. 1019 (2006), and the Third Circuit's decision in *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (1990). There is, however, no conflict.

In *Vines*, the Fifth Circuit held that when the EEOC seeks relief on behalf of individuals and loses, collateral estoppel bars those individuals from seeking relief on the same charges. 398 F.3d at 706-707. In *U.S. Steel*, the Third Circuit held that individuals who fully litigated their own claims are barred by res judicata from recovering relief in a subsequent EEOC action based on the same claims. 921 F.2d at 496-497. There is no conflict between those collateral estoppel and res judicata decisions and the decision below. Because there has been no prior action involving the claims raised by the EEOC in this case, the doctrines of collateral estoppel

and res judicata are inapplicable. Moreover, the court below expressly left open the possibility that collateral estoppel would bar an individual who sues and loses from obtaining relief in an EEOC action. Pet. App. 3a. At the same time, neither *Vines* nor *U.S. Steel* involved the distinct question whether an individual's failure to file a charge bars the EEOC from obtaining relief for that individual, and neither of those circuits has resolved that distinct issue. Petitioner's asserted conflict therefore does not exist.[2]

3. Rather than focusing on the question presented in this case, petitioner seeks to present the more general question "[w]hether conduct by individuals that bars them from obtaining individual relief under the federal antidiscrimination laws similarly bars the Equal Employment Opportunity Commission (EEOC) from obtaining individual relief on their behalf." Pet. (i). The sole question certified and resolved by the court of appeals, however, is the much narrower question whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." Pet. App. 1a.

Furthermore, in holding that the EEOC may obtain relief for individuals who have not filed timely administrative charges, the court of appeals did not suggest that

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[2] In *Vines*, the Court invited the views of the United States on whether certiorari should be granted. In its brief responding to that invitation, the United States argued that a judgment against the EEOC does not bar an individual from litigating his own ADEA claim. See Brief for the United States as Amicus Curiae at 6-12, *Vines*, *supra* (No. 04-1615). The United States nonetheless opposed review of that issue. *Id.* at 12-17. The Court denied a writ of certiorari. 126 S. Ct. 1019 (2006).

an individual's conduct could never affect the EEOC's ability to obtain relief for that individual, as petitioner's more general question implies. To the contrary, the court of appeals expressly recognized that under *Waffle House* and other cases, an individual's failure to mitigate and an individual's settlement of a claim *would* affect the EEOC's effort to obtain relief for that individual. Pet. App. 2a. And as discussed above, the court of appeals also left open the possibility that when an individual sues and loses, the EEOC may be foreclosed from obtaining relief for that individual. *Id.* at 3a.

At the same time, as *Waffle House* makes clear, "it simply does not follow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative." 534 U.S. 297. The Court has recognized "several situations in which the EEOC does not stand in the employee's shoes," *ibid.*, including when the employees actively oppose relief, as in *Tony & Susan Alamo Foundation*, and when an employee agrees to arbitration, as in *Waffle House*. The court of appeals correctly concluded that an employee's failure to file a charge is another situation in which an employee's conduct does not affect the EEOC's authority to seek victim-specific relief.

Because the court of appeals resolved only the narrow question whether an individual's failure to file a timely charge affects the EEOC's authority to seek relief for that individual, because it correctly resolved that question, and because the court's interlocutory decision on that issue does not conflict with the decision of any other court of appeals, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006